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THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL J. PHILLIPS

MAILED

MAR 10 1997

Appeal No. 94-4215
Application 07/927,515¹

PAT.&T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

ON BRIEF

Before McCANDLISH, MEISTER, and McQUADE, *Administrative Patent Judges*.

MEISTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Michael J. Phillips (the appellant) appeals from the refusal of the examiner to allow claims 28-36 which were added subsequent

¹ Application for patent filed November 7, 1992.

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to the final rejection. Claims 28-36 are the only claims remaining in the application. We reverse.

The appellant's invention pertains to a surface-ripened cheese product and to a method of making such a product.

Independent claims 28 and 31 are further illustrative of the appealed subject matter and read as follows:

28. A surface-ripened cheese product having a shelf life of at least 20 weeks at 2°C to 5°C, prepared from a stable natural cheese base wherein a surface-ripening culture selected from the group consisting of *Penicillium candidum* and *Penicillium camemberti* is applied to the outside surface of said stable natural cheese base.

31. A method of making a surface-ripened cheese product having a shelf life of at least 20 weeks at 2°C to 5°C, comprising the step of applying a surface-ripening culture selected from the group consisting of *Penicillium candidum* and *Penicillium camemberti* to the outside surface of a stable natural cheese base, and incubating under controlled conditions.

The reference relied on by the examiner is:

Sprenger	4,568,548	Feb. 4, 1986
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Claims 28-36 stand rejected under 35 U.S.C. § 103 as being unpatentable over Sprenger. According to the examiner:

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Sprenger discloses a process for producing a cheese product which has good shelf-life and retains the original flavor of a natural cheese comprising spraying a cheese mass with *Penicillium* mold (i.e., *Penicillium candidum* and *Penicillium camemberti*) where the finished product has a tested shelf-life of at least 12 weeks at 6°C to 8°C (see entire patent).

Appellant's claim differs as to the specifically claimed shelf-life and the specific incubation conditions (claim 35). [See answer, page 3; emphasis in original.]

In an apparent response to the appellant's argument that the claimed invention does not "use an impermeable or permeable external layer to extend considerably the shelf life" (see brief, page 3), the answer also states "[a]ppellant does not exclude the use of an external layer" (see answer, page 5).

It thus appears that the examiner's position is bottomed on the belief that the claims differ only with respect to the claimed shelf life and the specific incubation conditions.

We do not agree. Independent claims 28 and 31 each expressly require that the *Penicillium candidum* or *Penicillium camemberti* be applied to the outside surface of the natural cheese base. That is, the *Penicillium candidum* or *Penicillium camemberti* must be applied directly to the outside surface. As the examiner

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recognizes, in Sprenger a barrier film is first applied over the top of the cheese base and thereafter the *Penicillium candidum* or *Penicillium camemberti* is sprayed over the barrier film (see column 4, lines 24-50). While the examiner has correctly noted that the claims on appeal do not "preclude" an external layer, they nevertheless expressly require that the *Penicillium candidum* or *Penicillium camemberti* be applied to the outside surface of the cheese base. In Sprenger it is the barrier film, not the *Penicillium candidum* or *Penicillium camemberti*, that is applied to the outside surface of the cheese base. Stated differently, in Sprenger the *Penicillium candidum* or *Penicillium camemberti* is applied to the barrier film and not the outside of the cheese base. Indeed, Sprenger expressly teaches that the *Penicillium candidum* or *Penicillium camemberti* should not be applied to the outside surface of the cheese base (see column 4, lines 29-35).

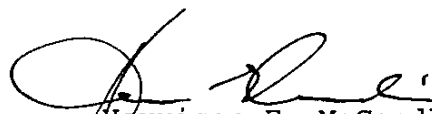
Since there is nothing in Sprenger which either teaches or fairly suggests applying *Penicillium candidum* or *Penicillium camemberti* to the outside surface of the cheese base, we will not

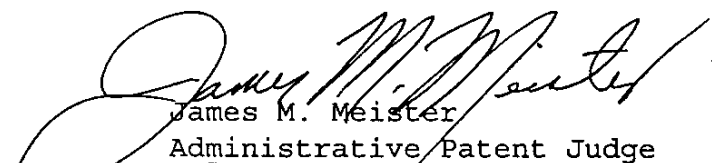
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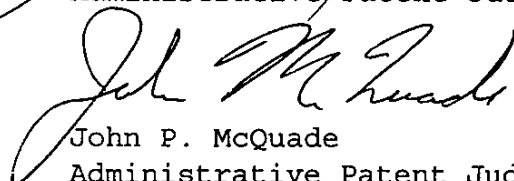
sustain the examiner's rejection of the appealed claims under
35 U.S.C. § 103 based on this reference.

The decision of the examiner is reversed.

REVERSED


(
Harrison E. McCandlish, Senior)
Administrative Patent Judge)


(
James M. Meister) BOARD OF PATENT
Administrative Patent Judge) APPEALS AND


(
John P. McQuade) INTERFERENCES
Administrative Patent Judge)

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